

THE HONORABLE _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BIOORIGYN, LLC, and JOANNA
ELLINGTON CLIFTON

Plaintiffs,

v.

FAIRHAVEN HEALTH, LLC,

Defendant.

Case No. _____

COMPLAINT

COMPLAINT

Plaintiffs BioOrigyn, LLC (“BioOrigyn”) and Dr. Joanna Ellington Clifton (“Dr. Ellington”) (collectively, “Plaintiffs”), by their undersigned attorneys, file this Complaint against defendant Fairhaven Health, LLC (“Defendant” or “Fairhaven”) and allege as follows:

THE PARTIES

1. Plaintiff BioOrigyn, LLC is a limited liability company organized and existing under the laws of the state of Washington, with its principal place of business at 17206 S. Spangle Creek Rd., Valleyford, WA 99036.

2. Plaintiff Dr. Joanna Ellington Clifton is the founder of BioOrigyn and resides in the state of Washington.

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133018.0001/7977144.1

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3. Upon information and belief, Defendant Fairhaven Health, LLC is a limited liability company organized and existing under the laws of the state of Washington, with its principal place of business at 1410 11th St., Bellingham, WA 98225.

NATURE OF THE ACTION

4. Dr. Ellington is a world-renowned scientist in the area of reproduction and infertility. She is the founder of BioOrigyn, and a named inventor on over a dozen U.S. and foreign patents. Dr. Ellington's research led her to develop the world's first fertility-friendly lubricant, Pre-Seed, followed by many other scientifically and commercially valuable inventions.

5. The relationship between the parties was initially limited to Fairhaven serving as a wholesale customer and distributor for BioOrigyn's Pre-Seed product.

6. Overtime, however, the parties entered into a business collaboration on product development. Specifically, BioOrigyn helped Defendant develop and commercialize various Fairhaven-branded products including Isofresh, BabyIt, BabyDance, and an impending gel product in exchange for royalty payments on the sales of those products.

7. BioOrigyn and Fairhaven executed various agreements in the course of their collaboration—including an Asset Purchase Agreement dated November 25, 2014 ("APA"), a License Agreement dated November 25, 2014 ("2014 License"), and a License Agreement dated January 8, 2015 ("2015 License").

8. In addition, on May 1, 2015, Fairhaven executed a license agreement with Dr. Ellington, along with her exclusive licensee at the time (Dr. E. Publishing LLC, which is now dissolved), for certain rights in relation to the use of her Name and Likeness, as discussed below ("Likeness License").

9. On November 19, 2015, Fairhaven provided a written notice to terminate the Likeness License. However, as discussed in more detail below, Dr. Ellington allowed Fairhaven to use her Name and Likeness on an *ad hoc* basis until June 21, 2017.

10. Yet, Fairhaven continues the exploitation of Dr. Ellington's Name and Likeness up to present day, and has commercially used her Name and Likeness in false and deceptive manners.

11. This cause of action is based on Defendant's misappropriation of Dr. Ellington's name, including her full and formal names, nicknames, or aliases¹ ("Name"), image, signature, voice, likeness and other representations (collectively, "Likeness"), and Defendant's false advertising and deceptive commercial practices related to the unauthorized and commercial use and distribution of her Name and Likeness.

12. Plaintiffs seek injunctive relief, damages and such other relief as the Court deems proper.

13. This action arises under the Lanham Act, 15 U.S.C. § 1125 *et seq.* as well as state law claims under Washington law.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the subject matter of this action pursuant to 15 U.S.C. §§ 1121, 1125. This Court has supplemental jurisdiction over Plaintiffs' claims under the laws of the State of Washington pursuant to 28 U.S.C. § 1367.

15. This Court has personal jurisdiction over Defendant because Defendant has previously submitted to the jurisdiction of this Court.

16. For example, Defendant has previously submitted to the jurisdiction of this Court, including in a pending litigation between Fairhaven and BioOrigyn concerning issues arising from the 2014 License and the 2015 License. *See Fairhaven Health LLC v. BioOrigyn, LLC et al*, Civil Action No. 19-cv-01860-RAJ.

17. Personal jurisdiction over Defendant is also proper, because, on information and belief, Defendant has a principal place of business in this district, has transacted and done

¹ Other than her legal name, Dr. Ellington has also used names such as "Dr. J. Ellington," "Dr. E," and "Dr. JE Ellington" in publications and public engagement. Unless otherwise clarified, this Complaint will address her by Dr. Ellington and reference the names in a collective manner.

1 business in this district, has continuous and systematic contacts within this district, and has
2 wrongfully caused injury to Plaintiffs in the State of Washington and in this district.

3 18. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c) because
4 Defendant transacts business in and/or has substantial contacts with and/or may be found in the
5 State of Washington and this district. Venue is also proper because Defendant has and continues
6 to advertise, promote, display, ship, offer for sale, and sell its products based on misappropriation
7 of Dr. Ellington's Name and Likeness in the State of Washington and this district.

8 **FACTS COMMON TO ALL CLAIMS FOR RELIEF**

9 **A. Plaintiffs' Activities**

10 19. BioOrigyn was formed in 2001. Dr. Ellington—the founder of BioOrigyn—has
11 devoted herself to research and development activities at BioOrigyn. Dr. Ellington specializes
12 in identifying areas of need in reproductive and genital health, and developing safer, more
13 effective alternatives to existing technologies. Based on Dr. Ellington's research, BioOrigyn
14 through various distribution and license agreements offers various fertility-friendly and/or
15 feminine care products, including Pre-Seed, Therio-gel, BabyIt, BabyDance, and IsoFresh.

16 20. Dr. Ellington is widely respected and well-known in her field. For example, she
17 has appeared as an expert on National Geographic's television documentary "The Great Sperm
18 Race," and NPR RadioLab's "Why so Many Sperm." In 2003, Dr. Ellington received the
19 internationally-selected Young Andrologist Award from the American Society of Andrology.
20 Dr. Ellington has been a featured blogger at *BlogHer.com*, and published a book titled *Slippery*
21 *When Wet*. In addition, Dr. Ellington has authored or co-authored over fifty scientific
22 publications.

23 21. Echoing its founder's passion, BioOrigyn embraces industry collaboration to
24 bring novel inventions to the public.

25 **B. Business Relationship between the Parties**

26 22. BioOrigyn and Defendant have collaborated on developing and commercializing
27 products.

23. On October 15, 2014, BioOrigyn and Defendant entered into a Consulting Agreement for BioOrigyn to provide advisory services to Defendant.

24. On November 25, 2014, BioOrigyn and Defendant entered into the 2014 License, which granted Defendant, among other things, an exclusive license to certain patents. BabyIt—a commercial product currently offered by Fairhaven—practices at least one patent licensed under the 2014 License.

25. BioOrigyn and Defendant also entered into the APA on November 25, 2014, which, among other things, transferred assets, including trademarks, related to a product brand—IsoLove—from BioOrigyn to Defendant.

26. On January 8, 2015, BioOrigyn and Defendant entered into the 2015 License, which granted Defendant, among other things, an exclusive license to certain patents. Commercial products of Fairhaven, including IsoFresh and BabyDance, were later developed by the parties and practice patents licensed under the 2015 License.

27. On information and belief, Defendant has greatly benefited from the collaboration with BioOrigyn including, without limitation, profiting through selling brand-named products and claiming the standing of a “trusted provider[] of non-prescription fertility solutions and pregnancy health products.”²

28. Defendant currently sells commercial products IsoFresh, BabyIt and BabyDance—each developed by BioOrigyn as part of the collaboration with Defendant. IsoFresh is marketed as a balancing vaginal gel; BabyIt is marketed as a perineal massage and postpartum comfort gel; and BabyDance is marketed as a fertility lubricant.

29. Upon information and belief, IsoFresh was first offered for sale in or around October 2016, BabyIt was first offered for sale in or around January 2017, and BabyDance was

² *Our Medical Health Advisors*, Fairhaven Health, <https://www.fairhavenhealth.com/advisors> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Sept. 4, 2018), <https://web.archive.org/web/20180904082703/https://www.fairhavenhealth.com/advisors>.

1 first offered for sale in or around October 2017. Defendant has marketed IsoFresh, BabyIt and
2 BabyDance under the IsoLove brand name (collectively, “the IsoLove products”).

3 30. Upon information and belief, Defendant was unable to develop and market under
4 its own name any fertility-friendly or topical gel-based feminine hygiene product until its
5 collaboration with BioOrigyn.

6 31. Upon information and belief, Defendant sought collaboration with BioOrigyn in
7 part because of Dr. Ellington’s expertise and prestige in the industry. In the course of expanding
8 their collaboration, the parties discussed how Dr. Ellington could facilitate Defendant in
9 successfully commercializing products.

10 32. On May 1, 2015, Dr. Ellington and Defendant entered into the Likeness License,
11 which granted Defendant, among other things, the right to use Dr. Ellington’s Name and Likeness
12 in relation to certain products, including a product called “FertilAid for Men,” and subject to
13 certain restrictions, including that Fairhaven would not use Dr. Ellington’s Name or Likeness to
14 endorse or approve any product or service of Fairhaven without Dr. Ellington’s written
15 permission and that Defendant shall use all reasonable efforts to preserve the goodwill and
16 integrity associated with her Name and Likeness. *See* Exhibit 1, Section 2.

17 33. In addition, pursuant to the terms of the Likeness License (Section 4), Defendant
18 was obligated to make a monthly payment for use of Dr. Ellington’s Name and Likeness.

19 34. In November 2015, Defendant terminated the Likeness License claiming that it
20 had not done much with Dr. Ellington’s Name and Likeness.

21 35. However, Defendant did not stop using Dr. Ellington’s Name and Likeness after
22 termination of the Likeness License. Upon information and belief, as BioOrigyn and Fairhaven
23 continued to collaborate on various products, Defendant continued to use and profit from the
24 fame, recognition, and respect of Dr. Ellington in its marketing activities.

25 36. Dr. Ellington sought to rein in potential misuse of her Name and Likeness when
26 she uncovered Defendant’s failure to respect the terms and termination of the Likeness License.
27 Specifically, in view of the long-term business relationship between Defendant and BioOrigyn,

Dr. Ellington agreed to permit Defendant's use of her Name and Likeness on specified products at no additional cost if such use was appropriate in a given circumstance. But Defendant abused this *ad hoc* permission. Among other things, Defendant repeatedly failed to provide its contemplated use of her Name and Likeness for Dr. Ellington's prior approval, and pursued exaggerated product marketing materials relying on the good name of Dr. Ellington. As such, on June 21, 2017, Dr. Ellington terminated any permission she had previously granted, and requested that Defendant discontinue using her Name and Likeness for any and all products. Defendant acknowledged this request, but failed to stop using Dr. Ellington's Name and Likeness.

C. Defendant's misuse of Dr. Ellington's Name and Likeness

37. To this day, Defendant continues to misuse Dr. Ellington's Name and Likeness. For example, Defendant has continued to use Dr. Ellington's Name and Likeness on products that were once covered by the terminated Likeness License (*i.e.*, FertilAid for Men; *see infra* at C.2.). Defendant has also used Dr. Ellington's Name and Likeness to promote the IsoLove products without authorization (*i.e.*, BabyIt, IsoFresh, and BabyDance; *see infra* at C.1.).

38. In addition to product related uses, Defendant more generally referenced Dr. Ellington's Name and Likeness as a trusted "Medical Health Advisor." Defendant identified its Medical Health Advisors as a key reason that it "is among the most trusted providers of non-prescription fertility solutions and pregnancy health products." Upon information and belief, as recent as May 2019, Defendant publicized Dr. Ellington as its Medical Health Advisor and used her Name and Likeness in the following manner to gain the publics' trust:³

³ See WayBackMachine (Sept. 4, 2018), <https://web.archive.org/web/20180904082703/https://www.fairhavenhealth.com/advisors>.

Our Medical Health Advisors

Our Team



Joanna Ellington, PhD

Joanna Ellington, PhD, is an internationally recognized scientist in the area of sexual medicine and sperm physiology. Dr. Ellington was awarded the prestigious Young Andrologist Award by her peers from around the world, in recognition of her groundbreaking research into sperm survival and function. Dr. Ellington's research into the role of arabinogalactan in protecting sperm cell function led her to invent Pre-Seed®, the world's first fertility-friendly lubricant for trying-to-conceive couples.

Her research and expertise have been featured in several national news stories, including her leading role in the National Geographic documentary, *The Great Sperm Race*. She is the author of *Slippery When Wet: One Woman's Journey Through the Mystery of Sex*.

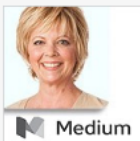
With over 75 peer-reviewed publications to her name, Dr. Ellington's primary areas of research includes post-ejaculation sperm storage in the Fallopian Tube, as well as how sperm DNA (genetic material) is damaged by environmental toxins, medications, and current assisted reproduction methods. Recently, her work has also focused on public education and advocacy to help people understand new advances in sexual medicine and sexual health. She has had numerous featured blogs on women's health at BlogHer, as well as other media channels.

39. In fact, Dr. Ellington was never formally appointed a "Medical Health Advisor" of Fairhaven. Defendant not only invented this title but also publicized the false association with Dr. Ellington. For example, Defendant spotlights Dr. Ellington as a "fertility expert *at Fairhaven Health*" in the Newsroom section of its website.⁴



[Can Coconut Oil Help Prevent Tearing? Your Perineal Massage Might Need Some Help](#)

Dr. Joanna Ellington, sexual health and fertility expert at Fairhaven Health shares her views on natural oils for perineal massage.



[What Women Need to Know About Their Vaginal pH](#)

Medium.com talks with Dr. Joanna Ellington about Vaginal pH.

⁴ Newsroom, Fairhaven Health, <https://www.fairhavenhealth.com/newsroom/> (last visited Feb. 5, 2020), archived at WayBackMachine (Feb. 3, 2020), <https://web.archive.org/web/20200203215245/https://www.fairhavenhealth.com/newsroom/>; see also Samantha Darby, *Can Coconut Oil Help Prevent Tearing? Your Perineal Massage Might Need Some Help*, Romper, available at <https://www.fairhavenhealth.com/wp-content/uploads/coconutoil-perinealmassage.pdf>.

40. In addition, on its website Defendant referenced several original articles of Dr. Ellington.⁵ Upon information and belief, Dr. Ellington allowed Defendant to display the content of these articles pursuant to and during the term of the Likeness License. *See* Exhibit 1, Sections 2-3, 9(i). Defendant nonetheless continues to use these articles after it terminated the agreement. Upon information and belief, as recent as September 2019, Defendant also used Dr. Ellington's Name and Likeness along with these articles to create a false impression that Dr. Ellington serves as a Medical Health Advisor of Fairhaven and that she approves the products mentioned in the articles (Exhibit 2).

⁵ *See e.g.*, Joanna Ellington, *A Needle in a Hay Stack...Finding Your Most Fertile Day*, Fairhaven Health, <https://www.fairhavenhealth.com/ovulation-prediction-your-most-fertile-day> (last visited Feb. 18, 2020), *archived at* WayBackMachine (Feb. 18, 2020), <https://web.archive.org/web/20200218185904/https://www.fairhavenhealth.com/ovulation-prediction-your-most-fertile-day>; Joanna Ellington, *Beating Polycystic Ovary Syndrome with the Rule of 5*, Fairhaven Health, <https://www.fairhavenhealth.com/beating-polycystic-ovary-syndrome> (last visited Feb. 18, 2020), *archived at* WayBackMachine (Feb. 18, 2020), <https://web.archive.org/web/20200218190530/https://www.fairhavenhealth.com/beating-polycystic-ovary-syndrome>; Joanna Ellington, *Cervical Mucus, Creating the Pathway to Fatherhood*, Fairhaven Health, <https://www.fairhavenhealth.com/cervical-mucus-pathway-fatherhood> (last visited Feb. 18, 2020), *archived at* WayBackMachine (Feb. 18, 2020), <https://web.archive.org/web/20200218190951/https://www.fairhavenhealth.com/cervical-mucus-pathway-fatherhood>; Joanna Ellington, *Perineal Massage Made Easy*, Fairhaven Health, <https://www.fairhavenhealth.com/perineal-massage-made-easy/> (last visited Feb. 18, 2020), *archived at* WayBackMachine (Feb. 18, 2020), <https://web.archive.org/web/20200218191153/https://www.fairhavenhealth.com/perineal-massage-made-easy/>; and Joanna Ellington, *Perineal Massage Made Easy Part 2*, Fairhaven Health, <https://www.fairhavenhealth.com/perineal-massage-made-easy2> (last visited Feb. 18, 2020), *archived at* WayBackMachine (Feb. 18, 2020), <https://web.archive.org/web/20200218191322/https://www.fairhavenhealth.com/perineal-massage-made-easy2>.

A Needle in a Hay Stack...Finding Your Most Fertile Day



Dr. Joanna Ellington

There are close to 2 billion women of reproductive age on our planet. Every month, these women's bodies are designed to grow and release an egg that can be fertilized by sperm to form a new baby – except, of course, if the woman is pregnant, nursing or taking hormonal contraceptives. This egg release is called ovulation. Ovulation occurs when a small sac (the “follicle”) forms on the ovary. During a woman's six fertile days each month, the follicle becomes larger and the wall thinner, until “POP” – a signal from the brain causes a rupture of the sac and the woman's egg is swept into her Fallopian Tube. As the egg rolls down the tube it hopes to meet and merge with a healthy sperm so that conception can occur. Doing the math, with all of us ladies around the world, there could be as many as 278,000 human ovulations a second, each day, 365 days a year. That is a lot of popping and a lot of potential baby-making! All of this makes ovulation sound very exciting and sexy. But, in reality, it is a quiet and unobservable process, which means that most of us can only guess when it happens. The only way to see ovulation happen is to use advanced medical imaging equipment to track the forming follicle and the rupture (the “pop”) that leads to egg release. So unless you plan on buying a very expensive ultrasound machine to look at your ovaries every day (which has been done!), knowing exactly when you ovulate each month can feel like looking for that proverbial needle in a haystack.

This original article was written by Joanna Ellington, PhD. Dr. Ellington is an internationally-recognized researcher in the field of andrology and serves as medical advisor to Fairhaven Health. She has had numerous featured blogs on women's health at BlogHer, as well as other media channels.

1. The IsoLove product line

41. Upon information and belief, Fairhaven started selling the IsoLove products in the second half of 2016, and has since used Dr. Ellington's Name and Likeness in the distribution, marketing, promotion, offering for sale and sale of the IsoLove products, including BabyIt, IsoFresh, and BabyDance.

42. For example, on October 11, 2016, Fairhaven through an online press release distribution service issued a Press Release entitled “Fairhaven Health Launches New Brand,

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1 IsoLove; Revolutionary Isotonic and Paraben-Free Feminine Care Products.”⁶ The press release
 2 states that IsoFresh, sold under the IsoLove brand, was developed by Dr. Joanna Ellington—
 3 “acclaimed Reproductive Physiologist.” The press release was issued for the inaugural product
 4 in the IsoLove line (IsoFresh) and elaborated on Dr. Ellington’s involvement in the product
 5 development process. A follow-up press release on January 23, 2017,⁷ again, featured Dr.
 6 Ellington, essentially making her the public face of the IsoLove product line. By doing so,
 7 Fairhaven not only launched a product line, but also a marketing campaign in which Dr. Ellington
 8 was spotlighted as an endorser of the IsoLove brand.

9 43. Upon information and belief, Defendant distributes the IsoLove products in a
 10 number of ways including, among others, on its website (<https://www.fairhavenhealth.com/>), on
 11 another website it created exclusively for the IsoLove brand (<https://www.myisolove.com/>), on
 12 its Amazon storefront
 13 ([https://www.amazon.com/stores/node/2591657011?encoding=UTF8&field-](https://www.amazon.com/stores/node/2591657011?encoding=UTF8&field-lbr_brands_browse-bin=Fairhaven%20Health&ref=bl_dp_s_web_2591657011)
 14 [lbr_brands_browse-bin=Fairhaven%20Health&ref=bl_dp_s_web_2591657011](https://www.amazon.com/stores/node/2591657011?encoding=UTF8&field-lbr_brands_browse-bin=Fairhaven%20Health&ref=bl_dp_s_web_2591657011)), as well as on
 15 the distribution platforms operated by Fairhaven’s partnered distributors, including an Ebay store
 16 operated under the name Early-Pregnancy-Tests (<https://www.early-pregnancy-tests.com/> and
 17 <http://www.ebaystores.com/Early-Pregnancy-Tests>).

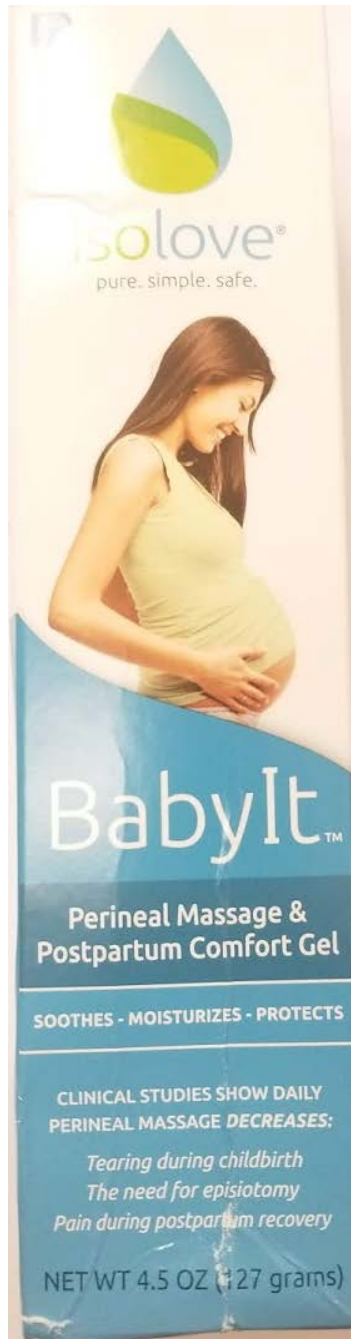
18 44. Upon information and belief, Defendant has misused Dr. Ellington’s Name and
 19 Likeness in its advertising materials for the IsoLove products, including on the packaging of the
 20 IsoLove products.

21 45. Defendant uses Dr. Ellington’s Name and Likeness on the packaging of BabyIt
 22 without authorization. As shown below, as of November 2019, a product purchased from the
 23 Fairhaven Health Amazon storefront bears the Name of Dr. Ellington, along with descriptions of

24 ⁶ See Fairhaven Health, *Fairhaven Health Launches New Brand, IsoLove; Revolutionary*
 25 *Isotonic and Paraben-Free Feminine Care Products*, PRWeb, available at
 26 <https://www.fairhavenhealth.com/wp-content/uploads/isolove-announcement.pdf> (Exhibit 3).

27 ⁷ See Fairhaven Health, *IsoLove by Fairhaven Health Launches BabyIt; Maternity &*
Postpartum Comfort Gel, PRWeb, available at
<https://www.prweb.com/pdfdownload/14003609.pdf> (Exhibit 4).

BabyIt provided in the form of an endorsement. This product endorsement remains on the packaging of a BabyIt product purchased from Amazon in January 2020.



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Almost half of all women experience genital trauma (e.g. tearing and/or stitches) during childbirth. This can cause chronic pain postpartum.

Perineal Massage is the ancient woman's practice of daily massage of the external birth canal to improve stretchiness and tissue relaxation during the last month of pregnancy.

Clinical studies show that Perineal Massage decreases the chance of genital trauma at childbirth, as well as decreasing the likelihood of postpartum pain.

80% of women who have used Perineal Massage would recommend it to other women.

BabyIt's patented, isotonic formula is uniquely pH balanced for the pregnant woman's genital tissues to optimize comfort and cellular support during this daily massage.



Detailed instructions for Perineal Massage enclosed.

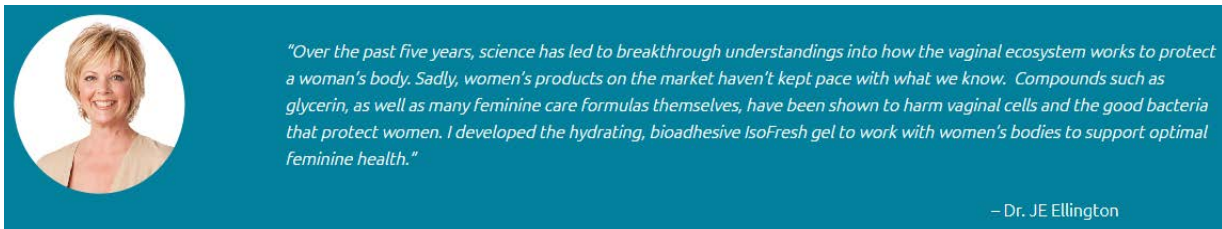
"I used Perineal Massage during my pregnancies knowing that it is clinically proven to decrease the chance of tearing during childbirth. I invented BabyIt's isotonic formula because I knew oils and other leading lubricants can cause vaginal irritation and infections."
- Dr. JE Ellington

46. Moreover, the MyIsoLove website used Dr. Ellington's Name and Likeness to promote the BabyIt product.⁸

⁸ Fairhaven Health, *BabyIt Perineal Massage and Postpartum Recovery Gel*, MyIsoLove.com, <https://www.myisolove.com/babyit-perineal-massage-postpartum-care> (last visited Feb. 5, 2020), *archived at* WayBackMachine (June 19, 2019),

For more information about the research supporting perineal massage and detailed information about how to perform perineal massage, read Dr. Joanna Ellington's two-part article called Decreasing Damage "Down Under" During Childbirth: Perineal Massage Made Easy, [Part 1](#) and [Part 2](#).

47. In addition, Defendant included a product endorsement on the MyIsoLove website to promote IsoFresh with Dr. Ellington's Name and Likeness.⁹



48. The MyIsoLove website included additional product endorsement for IsoFresh using Dr. Ellington's Name and Likeness.¹⁰

"There can be a lot of shame for women since they are told that the vagina is "self-cleaning" and they shouldn't have to use products to re-balance their natural pH. Sometimes the vagina needs to hydrate and exfoliate to begin re-balancing, even in healthy patients."

– Dr. JE Ellington



49. Upon information and belief, Dr. Ellington made the foregoing remarks to facilitate the debut of IsoFresh (*see supra* at ¶ 42). Defendant used this language as an endorsement by Dr. Ellington. Defendant eventually removed Dr. Ellington's name from the

<https://web.archive.org/web/20190619042614/https://www.myisolove.com/babyit-perineal-massage-postpartum-care>.

⁹ Fairhaven Health, *IsoLove = pure. simple. safe.*, MyIsoLove.com, <https://www.myisolove.com/> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Sept. 29, 2017), <https://web.archive.org/web/20170929210602/https://www.myisolove.com/>.

¹⁰ Fairhaven Health, *Control Yeast, Balance Bacteria, and Stop Odor With IsoFresh Balancing Gel*, MyIsoLove.com, <https://www.myisolove.com/isofresh-balancing-gel> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Mar. 25, 2017), <https://web.archive.org/web/20170325043057/https://www.myisolove.com/isofresh-balancing-gel/>.

1 above quote but continued to use her words, without proper attribution, as a product
2 endorsement.¹¹

3 *"There can be a lot of shame for women since they are told*
4 *that the vagina is "self-cleaning" and they shouldn't have to*
5 *use products to re-balance their natural pH. Sometimes the*
6 *vagina needs to hydrate and exfoliate to begin re-balancing,*
7 *even in healthy patients."*

8 – Dr. Peter Rizk, MD, MA, FRCOG, FRCS, HCLD, FACOG, FACS –
9 Professor and the Head of Reproductive Endocrinology &
10 Infertility at the University of South Alabama.

11 50. Upon information and belief, the MyIsoLove website continues to misuse
12 Dr. Ellington's Name and Likeness through at least February 2020.¹²

13 Pregnancy comes with a long list of "things to do" for the health of mom and baby,
14 and perineal massage is definitely on that list. We know that just 5 minutes a day
15 during the last several weeks of pregnancy can help prevent perineal trauma
16 during vaginal delivery. But, if you don't want to take just our word for it, read
17 more about the science supporting the [benefits of antenatal perineal massage](#) in
18 this article by Dr. Joanna Ellington.

19 ***

20 ¹¹ Fairhaven Health, *Control Yeast, Balance Bacteria, and Stop Odor With IsoFresh Balancing*
21 *Gel!*, MyIsoLove.com, <https://www.myisolove.com/isofresh-balancing-gel> (last visited Feb. 5,
22 2020), *archived at* WayBackMachine (Feb. 4, 2020),
[https://web.archive.org/web/20200204004150/https://www.myisolove.com/isofresh-balancing-](https://web.archive.org/web/20200204004150/https://www.myisolove.com/isofresh-balancing-gel)
23 [gel](https://web.archive.org/web/20200204004150/https://www.myisolove.com/isofresh-balancing-gel).

24 ¹² Fairhaven Health, *Vaginal Balance & Ecosystem*, MyIsoLove.com,
25 <https://www.myisolove.com/vaginal-balance-ecosystem> (last visited Feb. 5, 2020), *archived at*
26 *WayBackMachine* (Jan. 30, 2020),
[https://web.archive.org/web/20200130002128/https://www.myisolove.com/vaginal-balance-](https://web.archive.org/web/20200130002128/https://www.myisolove.com/vaginal-balance-ecosystem)
27 [ecosystem](https://web.archive.org/web/20200130002128/https://www.myisolove.com/vaginal-balance-ecosystem); Fairhaven Health, *APM Improves Birth Outcomes*, MyIsoLove.com,
<https://www.myisolove.com/apm-improves-birth-outcomes> (last visited Feb. 5, 2020), *archived*
[at WayBackMachine](https://web.archive.org/web/20200204141401/https://www.myisolove.com/apm-improves-birth-outcomes) (Feb. 4, 2020),
[https://web.archive.org/web/20200204141401/https://www.myisolove.com/apm-improves-](https://web.archive.org/web/20200204141401/https://www.myisolove.com/apm-improves-birth-outcomes)
[birth-outcomes](https://web.archive.org/web/20200204141401/https://www.myisolove.com/apm-improves-birth-outcomes).

Anderson DJ et al, 2014: "When in balance, the vagina is best at fighting off disease. The cells directly lining the vagina are older cells that are exfoliated (just like skin cells) with fresh cells appearing every 4 hours. This exfoliation of vaginal cells helps shed any bad bacteria that contact the vagina. As these cells shed, they release the glycogen that produces sugars to feed good bacteria in order to make lactic acid and maintain a healthy vaginal pH. These vaginal lining cells are also covered with a mucus layer, which is enriched with antimicrobial proteins. This mucus layer traps and kills bad bacteria and viruses. A healthy vaginal ecosystem can best fend off diseases three ways: 1) by exfoliation of the vaginal cells into the canal, 2) by providing glycogen to bolster good bacteria and create a low pH; and 3) by producing mucus and antibacterial agents that trap germs before they can penetrate deep into the vagina." *Dr. E Summary*

Mirmonsef P et al, 2014 & Mirmonsef P et al, 2015: "The glycogen from vaginal cells (which is broken down into sugars to feed the good lactic acid producing bacteria) is up 30 times lower in women after menopause than in younger women. It is also lower in women who smoke and women who have chronic vaginal infections. Douching may also disrupt healthy glycogen production. This decrease in glycogen and sugars for good bacteria to eat results in lower numbers of good bacteria; a higher vaginal pH; and a dramatic increase in the rate of vaginal infections." *Dr. E Summary*

51. Upon information and belief, the Ebay store of Early-Pregnancy-Tests is operated for the benefit of and controlled by Defendant. Early-Pregnancy-Tests states on its Ebay store page that it is "owned by Fairhaven Health."¹³ As of February 2020, the Ebay store of Early-Pregnancy-Tests continues to use Dr. Ellington's Name and Likeness to sell the BabyIt and IsoFresh products.¹⁴

¹³ Early Pregnancy Tests, *TTC Supplements*, Ebay.com, <http://www.ebaystores.com/Early-Pregnancy-Tests> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 29, 2020), <https://web.archive.org/web/20200129235515/http://www.ebaystores.com/Early-Pregnancy-Tests>.

¹⁴ Early Pregnancy Tests, *Fairhaven Health Babyit Perineal Massage Postpartum Recovery Gel ph Balanced*, Ebay.com, <https://www.ebay.com/itm/Fairhaven-Health-Babyit-Perineal-Massage-Postpartum-Recovery-Gel-ph-Balanced-/192286962838?hash=item2cc5323496> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 29, 2020), <https://web.archive.org/web/20200129235457/https://www.ebay.com/itm/Fairhaven-Health-Babyit-Perineal-Massage-Postpartum-Recovery-Gel-ph-Balanced-/192286962838?hash=item2cc5323496>; Early Pregnancy Tests, *Fairhaven Health Isofresh Balancing Vaginal Gel Cleanse Stay Fresh Odor Free*, Ebay.com, <https://www.ebay.com/itm/Fairhaven-Health-Isofresh-Balancing-Vaginal-Gel-Cleanse-Stay-Fresh-Odor-Free-/201915356498?hash=item2f0317d552> (last visited Feb. 5, 2020), *archived at*

A Message from Dr. Joanna Ellington, Inventor of BabyIt

"I used perineal massage during my pregnancies knowing that it is clinically proven to decrease the chance of tearing during childbirth. I invented BabyIt's isotonic formula because I knew oils and other leading lubricants can cause vaginal irritation and infections. Along with BabyIt's patented formula, I have worked to create unique, easy to follow instructions for making perineal massage successful for every woman. When I was trying to learn the technique with my first pregnancy, the instructions I was given didn't work for us as a couple. We later learned how to make the massage a bonding time for us!"

Dr. Joanna Ellington Inventor of IsoLove BioGels

"Most women experience unwanted, embarrassing feminine odor from time to time. For me this happens with the stress of long distance air travel. I have tried other non-isotonic freshening products and found them to be irritating and messy. I developed IsoFresh to be the first isotonic freshening gel matched to the cells in a woman's body. IsoFresh stays put and provides fresh balance for the long haul! IsoFresh doesn't mask odors, it works from the inside out to support a healthy vaginal ecosystem. I am very excited about this new product and look forward to hearing from other women about how using IsoFresh helps them have a more confident day!"

-Dr. Ellington



Created by a
Woman
for **Women**

A Message from Dr. Joanna Ellington, Inventor of IsoFresh:

Anna Davis,
Ph.D., RYT

"Most women experience unwanted, embarrassing feminine odor from time to time. For me this happens with the stress of long distance air travel. I have tried other non-isotonic freshening products and found them to be irritating and messy. I developed IsoFresh to be the first isotonic freshening gel matched to the cells in a woman's body. IsoFresh stays put and provides fresh balance for the long haul! IsoFresh doesn't mask odors, it works from the inside out to support a healthy vaginal ecosystem. I am very excited about this new product and look forward to hearing from other women about how using IsoFresh helps them have a more confident day!"

WayBackMachine (Jan. 29, 2020),
<https://web.archive.org/web/20200129235644/https://www.ebay.com/itm/Fairhaven-Health-Isofresh-Balancing-Vaginal-Gel-Cleanse-Stay-Fresh-Odor-Free-/201915356498?hash=item2f0317d552>.

COMPLAINT - 17
CASE NO. _____

133018.0001/7977144.1

LANE POWELL PC
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206.223.7000 FAX: 206.223.7107

52. The above identified marketing activities (*supra* ¶¶ 43-51) were not permitted by Dr. Ellington and/or BioOrigyn. In entering into the collaboration with Defendant, BioOrigyn made clear that Defendant should not publicize its relationship with BioOrigyn and shall not identify BioOrigyn on any packaging or marketing materials. As discussed above, the Likeness License allowed Fairhaven to use Dr. Ellington's Name and Likeness for limited purposes in connection with specific products, which did not include any of the IsoLove products. And, as of June 2017, Dr. Ellington specifically requested that Defendant discontinue referencing her in all marketing activities. Fairhaven nevertheless capitalized on her Name and Likeness for the sales of the IsoLove products, despite Dr. Ellington's request to cease all uses of her Name and Likeness.

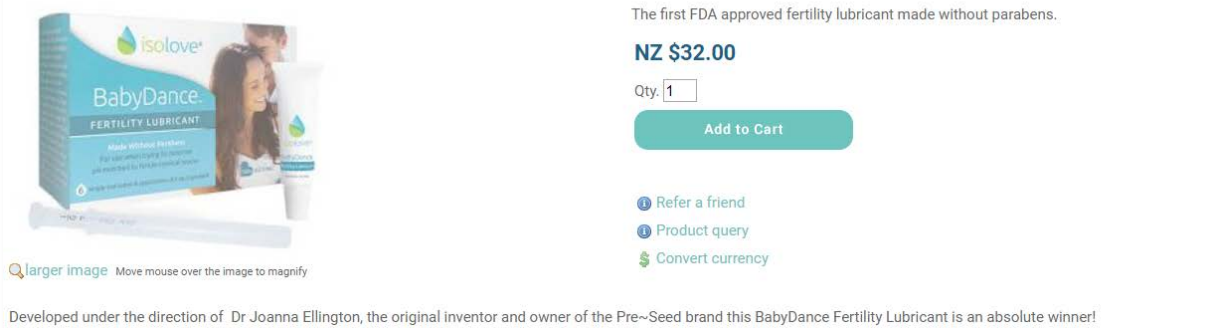
53. Upon information and belief, Fairhaven organized a marketing campaign of the IsoLove products centered around Dr. Ellington's reputation as an expert in the field, including the repeated unauthorized use of her Name and Likeness to endorse the IsoLove products. This marketing campaign can be found on the websites directly controlled by Defendant (*e.g.*, *supra* ¶¶ 46-51), and on corporate and business affiliates of Defendant. As an example, the American Pregnancy Association, which is sponsored by IsoLove, promotes the IsoLove products as being "[f]ormulated by the celebrated Reproductive Physiologist, Dr. Joanna Ellington."¹⁵ Upon information and belief, Defendant allowed other media channels and distribution networks to utilize Defendant's marketing materials including Dr. Ellington's Name and Likeness. For example, upon information and belief, "Baby4You," "National Fertility Society," and Health Monthly are each an authorized distributor of Defendant's products, and each of them references Dr. Ellington in promoting Defendant's products.¹⁶

¹⁵ *IsoLove*, American Pregnancy Association, <https://americanpregnancy.org/corp-sponsors/isolove/> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 29, 2020), <https://web.archive.org/web/20200129235819/https://americanpregnancy.org/corp-sponsors/isolove/>.

¹⁶ *Retailers & Distributors*, Fairhaven Health, https://www.fairhavenhealth.com/currentretanddist?_ga=2.217166870.1079900238.1571335048-140607404.1558444973&_gac=1.2763652.1571339312.EA1aIQobChMl6jwh-j5QIVS73ACh3pngFwEAAYASAAEgK13vD_BwE#international-distributors (last visited

54. To promote BabyDance, the Baby4You website promotes the connection between the BabyDance product and Dr. Ellington: “Developed under the direction of Dr. Joanna Ellington, the original inventor and owner of the Pre-Seed brand...”¹⁷ Upon information and belief, numerous other websites make similar statements.

BabyDance Fertility Lubricant - NEW from the Inventor of Pre~Seed



55. The website of National Fertility Society also cites to Dr. Ellington in selling the BabyIt product:¹⁸

For more information about the research supporting perineal massage and detailed information about how to perform perineal massage, read Dr. Joanna Ellington's two-part article called Decreasing Damage "Down Under" During Childbirth: Perineal Massage Made Easy, [Part 1](#) and [Part 2](#).

Feb. 5, 2020), *archived at* WayBackMachine (Feb. 5, 2020) https://web.archive.org/web/20200205212422/https://www.fairhavenhealth.com/currentretandist?_ga=2.217166870.1079900238.1571335048-140607404.1558444973&_gac=1.2763652.1571339312.EAIAIQobChMII6jwh-j5QIVS73ACh3pngFwEAAYASAAEgK13vD_BwE%23international-distributors.

¹⁷ *BabyDance Fertility Lubricant - NEW from the Inventor of Pre~Seed*, Baby4You, <https://www.baby4you.co.nz/shop/Trying+to+Conceive/Fertility+Friendly+Lubricants/BabyDance+Fertility+Lubricant+-+NEW+from+the+Inventor+of+Pre~Seed.html> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 30, 2020), <https://web.archive.org/web/20200130000550/https://www.baby4you.co.nz/shop/Trying+to+Conceive/Fertility+Friendly+Lubricants/BabyDance+Fertility+Lubricant+-+NEW+from+the+Inventor+of+Pre~Seed.html>.

¹⁸ *BabyIt Perineal Massage and Postpartum Recovery Gel*, National Fertility Society, <https://www.nationalfertilitysociety.co.uk/product/babyit-perineal-massage-and-postpartum-recovery-gel> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Feb. 5, 2020), https://web.archive.org/web/*/https://www.nationalfertilitysociety.co.uk/product/babyit-perineal-massage-and-postpartum-recovery-gel.

COMPLAINT - 19
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133018.0001/7977144.1

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56. Similarly, the website of Health Monthly introduces in its product listing “[a] message from Dr. Joanna Ellington, Inventor of IsoFresh”:¹⁹

A Message from Dr. Joanna Ellington, Inventor of IsoFresh:

Anna Davis, Ph.D., RYT“Most women experience unwanted, embarrassing feminine odor from time to time. For me this happens with the stress of long distance air travel. I have tried other non-isotonic freshening products and found them to be irritating and messy. I developed IsoFresh to be the first isotonic freshening gel matched to the cells in a woman's body. IsoFresh stays put and provides fresh balance for the long haul! IsoFresh doesn't mask odors, it works from the inside out to support a healthy vaginal ecosystem. I am very excited about this new product and look forward to hearing from other women about how using IsoFresh helps them have a more confident day!”

57. Thus, Defendant’s exploitation of Dr. Ellington’s Name and Likeness has led to widespread unauthorized use of her Name and Likeness around the IsoLove products.

2. FertilAid for Men

58. Upon information and belief, Fairhaven started selling FertilAid for Men in or before 2003, as a supplement to support male fertility. Defendant has used Dr. Ellington’s Name and Likeness in the distribution, marketing, promotion, offering for sale and sale of this product.

59. Upon information and belief, Defendant distributes FertilAid for Men in a number of ways including, among others, on its website, a website it created exclusively for the FertilAid branded products (<https://www.fertilaid.com/>), its Amazon storefront, and on various other distribution platforms operated by Fairhaven’s partnered distributors, including Early-Pregnancy-Tests (*see supra* at ¶ 43). In addition, as further discussed below, Defendant was able to offer this product for sale in retail at Target and other stores by capitalizing on Dr. Ellington’s Name and Likeness.

60. FertilAid for Men was one of the Approved Products as defined in the Likeness License, but Defendant went beyond the terms of the approval by using Dr. Ellington’s Name

¹⁹ *IsoLove IsoFresh Balancing Vaginal Gel*, Health Monthly, https://www.healthmonthly.co.uk/fairhaven_health_isolove_isofresh_balancing_vaginal_gel (last visited Feb. 11, 2020), *archived at* WayBackMachine (Feb. 11, 2020), https://web.archive.org/web/20200211220112/https://www.healthmonthly.co.uk/fairhaven_health_isolove_isofresh_balancing_vaginal_gel.

1 and Likeness to publicly endorse the product. For example, as recently as February 12, 2019,
 2 Defendant's website used Dr. Ellington's Name and Likeness to endorse FertilAid for Men by
 3 stating "I recommend all trying-to-conceive men take . . . FertilAid for Men."²⁰



"Most of the men that had increased sperm counts while taking FertilAid for Men, showed improvements of 20% or more in the number of healthy sperm. Based on this data as well as that in several other studies, I recommend all trying-to-conceive men take a fertility vitamin, such as FertilAid for Men, to optimize their sperm quality."

– Dr. Joanna Ellington, CEO of ING Fertility and inventor of Pre~Seed

61. As another example, Defendant's website includes numerous references to Dr. Ellington and her involvement in a clinical study. Under a section of Defendant's website entitled "FertilAid for Men Clinical Study," Defendant purports to quote from Dr. Ellington:²¹

According to Dr. J.E. Ellington, "men with higher levels of motile, normally shaped sperm have shown better pregnancy outcomes in several [independent] studies."

62. In yet another section of Defendant's website entitled "FertilAid Resources And Scientific Literature," Defendant purports to use quotes from Dr. Ellington:²²

²⁰ Fairhaven Health, *Why FertilAid For Men?*, FertilAid.com, <https://www.fertilaid.com/why-fertilaid-men> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jul. 29, 2019), <https://web.archive.org/web/20190729114825/https://www.fertilaid.com/why-fertilaid-men>.

²¹ Fairhaven Health, *FertilAid For Men Clinical Study*, FertilAid.com, <https://www.fertilaid.com/fertilaid-men-clinical-study> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 30, 2020), <https://web.archive.org/web/20200130011640/https://www.fertilaid.com/fertilaid-men-clinical-study>.

²² Fairhaven Health, *FertilAid Resources And Scientific Literature*, FertilAid.com, <https://www.fertilaid.com/fertilaid-resources-and-scientific-literature> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 30, 2020), <https://web.archive.org/web/20200130011607/https://www.fertilaid.com/fertilaid-resources-and-scientific-literature>.

According to Dr. J.E. Ellington,
 “men with higher levels of motile, normally
 shaped sperm have shown better
 pregnancy outcomes in several
 [independent] studies.”

63. Defendant went so far as to promote a “Testimonial by Dr. J. Ellington” and have Dr. Ellington declare that FertilAid For Men “has the critical supplements that have been shown to be effective in assisting sperm production.”²³

Testimonial By Dr. J. Ellington

March 14th, 2018 | Categories: Newsroom

Dr. J Ellington, Sperm Physiologist, Creator of Pre~Seed



Many published studies have shown a benefit to sperm quality from the ingredients in FertilAid. Both myself & Dr. Clifton (Doctor of Pharmacy) have reviewed the composition of FertilAid & believe that it has the critical supplements that have been shown to be effective in assisting sperm production. To learn the results of this benchmark study, [click here](#). Dr. J Ellington is the creator of Pre~Seed.

[<<Back to Newsroom](#)

64. The above identified marketing activities (*supra* ¶¶ 59-63) were not authorized by Dr. Ellington and/or BioOrigyn. The Likeness License allowed Fairhaven to use Dr. Ellington’s Name and Likeness in connection with FertilAid for Men, but was terminated and did not allow for product endorsements. As discussed, Dr. Ellington allowed use of her Name and Likeness on an *ad hoc* basis until June 21, 2017. Fairhaven nevertheless capitalized on Dr. Ellington’s Name and Likeness for the sales of FertilAid for Men, despite Defendant terminating the Likeness License and Dr. Ellington’s request to cease all uses.

65. Upon information and belief, Defendant’s websites including the FertilAid website continue to misuse Dr. Ellington’s Name and Likeness through at least February 2020.

²³ Fairhaven Health, *Testimonial By Dr. J. Ellington*, FertilAid.com, <https://www.fertilaid.com/category/newsroom> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 30, 2020), <https://web.archive.org/web/20200130005756/https://www.fertilaid.com/category/newsroom>.

66. Upon information and belief, Defendant also allowed other media channels and distribution networks to utilize Defendant's marketing materials including Dr. Ellington's Name and Likeness. For example, the website of Early-Pregnancy-Tests references Dr. Ellington to promote FertilAid for Men.²⁴

Designed and conducted by Dr's. J.E. Ellington and Dr. G.D. Clifton, the FertilAid for Men study was carried out over a three month period to determine the possible benefits of using the FertilAid supplement. The study selected men with documented abnormal sperm parameters, as defined by the W.H.O. The results of the FertilAid study revealed a "significant improvement" in the number of motile sperm, or "total normal sperm motility". According to study designers, "higher levels of motile, normally shaped sperm" are predictive of increased pregnancy rates. "Sperm motility" is understood as the capacity of sperm to swim in a progressive, forward manner. "Sperm count" refers to the quantity or production of [healthy or motile] sperm.

67. Another website titled "Fertilaid.Weebly.com" incorporates similar reference to Dr. Ellington as do many other Fairhaven affiliated websites and distributors.²⁵

Dr. J Ellington "Many published studies have shown a benefit to sperm quality from the ingredients in FertilAid. Both myself & Dr. Clifton (Doctor of Pharmacy) have reviewed the composition of FertilAid & believe that it has the critical supplements that have been shown to be effective in assisting sperm production." To learn the results of this benchmark study, click here - Dr. J Ellington, Sperm Physiologist, Creator of Pre~Seed

68. Thus, in marketing FertilAid For Men, Defendant's exploitation of Dr. Ellington's Name and Likeness has led to widespread unauthorized use of her Name and Likeness. Among other harm, Dr. Ellington and BioOrigyn have been financially damaged for not being compensated for the use of her Name and Likeness.

²⁴ *Clinical Research on FertilAid Suggests Increased Sperm Health*, Early-Pregnancy-Tests, <https://www.early-pregnancy-tests.com/research> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Feb. 5, 2020) <https://web.archive.org/web/20200205233912/https://www.early-pregnancy-tests.com/research>.

²⁵ *FertilAid Fertility Supplement*, FertilAid.Weebly.com, <http://fertilaid.weebly.com/> (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 30, 2020), <https://web.archive.org/web/20200130003018/http://fertilaid.weebly.com/>.

D. Defendant's false advertising and deceptive business practices

1. The IsoLove product line

69. Upon information and belief, using Dr. Ellington's Name and Likeness, Defendant has falsely advertised the IsoLove products to the detriment of Dr. Ellington and BioOrigyn.

70. As an example, Fairhaven advertises BabyIt as a perineal massage gel that has "no irritation potential,"²⁶ which Dr. Ellington believed to be true when she formulated the product. However, upon information and belief, user feedback informed Fairhaven of the likelihood of irritation caused by BabyIt. Dr. Ellington learned of such feedback from Fairhaven and, in response, fine-tuned the formulation of BabyIt to prevent irritation. Upon information and belief, on more than one occasion, Dr. Ellington urged Fairhaven to adopt the modified formula to protect the women who use BabyIt. But Defendant elected not to change the product—it continued claiming that BabyIt has "no irritation potential," and continues to incorporate a comment from Dr. Ellington on the BabyIt packaging, including telling customers that BabyIt is designed to be irritation free. (*See supra* at ¶ 45.) Consumers who purchased BabyIt for its non-irritation potential may later experience the opposite, harming Dr. Ellington's reputation because Defendant includes a statement from Dr. Ellington on the packaging of BabyIt touting its lack of irritation. Defendant's false and/or misleading advertising of BabyIt harms BioOrigyn and Dr. Ellington, because Defendant's unauthorized use of her Name and Likeness has inextricably linked BioOrigyn and Dr. Ellington to this product.

71. In addition, Defendant promotes the BabyDance product in a deceptive manner. As discussed, Dr. Ellington invented and developed a product called Pre-Seed, which is a fertility friendly personal lubricant. Upon information and belief, Defendant has acted as a distributor for the Pre-Seed product since 2003. As the popularity of Pre-Seed grew, Defendant became a

²⁶ *See supra* at 8.

1 leading online seller for this product. This changed, however, when Defendant launched
2 BabyDance—a product sold under the IsoLove brand name.

3 72. Upon information and belief, to capitalize on the well-respected Pre-Seed name,
4 Defendant set up a product listing page for Pre-Seed in which it informs customers that it is “out
5 of stock of Pre-Seed” and “would highly recommend the BabyDance Fertility Lubricant
6 instead.”²⁷ Upon information and belief, this statement was false because Defendant’s Ebay store
7 (Early-Pregnancy-Tests) still made Pre-Seed available for sale.²⁸ Upon information and belief,
8 this statement was also false because Defendant implies that it will replenish the Pre-Seed
9 product, but in fact, has discontinued offering Pre-Seed. Upon information and belief, Defendant
10 continues to list the Pre-Seed product solely to trade on the reputation of the Pre-Seed name in
11 an attempt to boost the sales of BabyDance. Upon information and belief, Defendant’s webpage
12 is meant to mislead the public by drawing Internet traffic based on the brand reputation of “Pre-
13 Seed.” This is also evidenced by Defendant’s repeated references to Dr. Ellington as the inventor
14 or creator of Pre-Seed (*see e.g., supra* at ¶¶ 38, 54, 60, 63, 67).

15 73. Defendant also makes several false and/or misleading statements about
16 BioOrigyn’s Pre-Seed product. For example, Defendant’s website states both products are “FDA
17 approved.” The products, however, have FDA “clearance,” not approval. In addition, under the
18 heading “[w]hat is the difference between PreSeed and BabyDance?” Defendant answers
19 “BabyDance is isotonic and formulated to match the pH levels of fertile quality fluid and is made

20 ²⁷ *Pre-Seed Lubricant*, Fairhaven Health, <https://www.fairhavenhealth.com/preseed-multi-use>
21 (last visited Feb. 5, 2020), *archived at* WayBackMachine (Jan. 30, 2020),
22 [https://web.archive.org/web/20200130003931/https://www.fairhavenhealth.com/preseed-multi-](https://web.archive.org/web/20200130003931/https://www.fairhavenhealth.com/preseed-multi-use)
23 [use](https://web.archive.org/web/20200130003931/https://www.fairhavenhealth.com/preseed-multi-use); *see also Pre-Seed Fertility Friendly Lubricant*, Early-Pregnancy-Tests, [https://www.early-](https://www.early-pregnancy-tests.com/preseed-multi-use)
24 [pregnancy-tests.com/preseed-multi-use](https://web.archive.org/web/20200206003243/https://www.early-pregnancy-tests.com/preseed-multi-use) (last visited Feb. 6, 2020), *archived at*
WayBackMachine (Feb. 6, 2020),
[https://web.archive.org/web/20200206003243/https://www.early-pregnancy-tests.com/preseed-](https://web.archive.org/web/20200206003243/https://www.early-pregnancy-tests.com/preseed-multi-use)
[multi-use](https://web.archive.org/web/20200206003243/https://www.early-pregnancy-tests.com/preseed-multi-use).

25 ²⁸ Pre-Seed was available for sale on Ebay as of Jan. 29, 2020; *see Purchase History*,
Ebay.com,
26 <https://offer.ebay.com/ws/eBayISAPI.dll?ViewBidsLogin&item=192282801289&rt=nc&trksid=p2047675.12564> (last visited Feb. 6, 2020), *archived at* WayBackMachine (Jan. 31, 2020),
27 [https://web.archive.org/web/20200131215433/https://offer.ebay.com/ws/eBayISAPI.dll?ViewB](https://web.archive.org/web/20200131215433/https://offer.ebay.com/ws/eBayISAPI.dll?ViewBidsLogin&item=192282801289&rt=nc&trksid=p2047675.12564)
[idsLogin&item=192282801289&rt=nc&trksid=p2047675.12564](https://web.archive.org/web/20200131215433/https://offer.ebay.com/ws/eBayISAPI.dll?ViewBidsLogin&item=192282801289&rt=nc&trksid=p2047675.12564).

1 without parabens.” A reasonable consumer would understand Defendant’s statement to mean
 2 that Pre-Seed is not isotonic, is not formulated to match the pH levels of fertile quality fluid, and
 3 is made with parabens. This is false, and therefore Defendant’s website is false and misleading.
 4 Upon information and belief, Defendant understands that Pre-Seed is isotonic, and it is pH
 5 balanced to mimic human body’s naturally fertile fluids.

6 74. Upon information and belief, Defendant’s deceptive business practices and false
 7 or misleading statements have damaged BioOrigyn by reducing the amount of royalties it
 8 otherwise would have earned from the sales of Pre-Seed. Notably, BioOrigyn collects royalties
 9 on sales of the Pre-Seed product. Defendant has interfered with BioOrigyn’s royalty rights
 10 through deceptive trade practices. As the creator of Pre-Seed, Dr. Ellington has also suffered
 11 harm to her name because of the false and/or misleading statements Defendant has made about
 12 the Pre-Seed product.

13 2. FertilAid for Men

14 75. Upon information and belief, using Dr. Ellington’s Name and Likeness,
 15 Defendant has falsely advertised FertilAid for Men to the detriment of Dr. Ellington and
 16 BioOrigyn.

17 76. As discussed above (*supra* ¶ 63), according to Defendant, FertilAid for Men
 18 purportedly received a “Testimonial” from Dr. Ellington after she conducted a study on the
 19 product. That study is described by Defendant as an independent, placebo-controlled, “gold
 20 standard” clinical study. But, as an initial matter, Defendant paid BioOrigyn to perform this
 21 study, therefore, it is false and misleading to promote the study as “independent.” Furthermore,
 22 upon information and belief, Defendant knew that this study was meant to be a preliminary trial,
 23 small in size with a limited test population (*i.e.*, 14 study subjects in total, with 8 of them
 24 receiving FertilAid For Men and the other 6 placebo treated). Despite this, Defendant
 25 systematically promoted this study to consumers as *proof* that FertilAid for Men was clinically
 26 validated and demonstrated to have certain effect not found in the study, purporting this study to
 27 be a “gold standard” clinical trial.

77. Notably, making reference to Dr. Ellington's study, Defendant markets FertilAid For Men as a fertility pill that is "*clinically proven* . . . to improve sperm *count, motility* and *morphology*" (emphasis added).²⁹

FertilAid for Men

★★★★★ (646 customer reviews)

\$29.95 as low as \$26.96

The #1-selling, clinically-proven male fertility supplement to improve sperm count, motility and morphology.

- A 2-in-1 powerful male fertility pill PLUS complete preconception multivitamin.
- Offers a wide spectrum of key fertility ingredients, including L-carnitine, zinc, CoQ10, and methylfolate to support sperm health.
- Patented, doctor-designed formula to support male fertility.

78. This statement is false and misleading, because results from the clinical study explicitly disclaim finding any improvements in the morphology of sperm, the motility of sperm, or overall sperm count. As disclosed by Dr. Ellington in the Journal of Andrology,³⁰ the following sperm parameters were analyzed in the study: (1) total ejaculate sperm count, (2) percent motile sperm, (3) percent forward progression of motile sperm, (4) total motile sperm count, (5) percent of sperm with normal morphology, and (6) total normal-motile sperm count. The study results revealed that the "total normal-motile sperm numbers in the ejaculate" improved among the eight study subjects using FertilAid for Men. "Additionally, the total mobile sperm count also showed a tendency towards improvement." However, "[o]ther parameters did not differ between the two groups."³¹ In other words, Dr. Ellington did not find any improvement

²⁹ *FertilAid for Men*, Fairhaven Health, <https://www.fairhavenhealth.com/fertilaid-for-men> (last visited Feb. 6, 2020), archived at WayBackMachine (Jan. 31, 2020), <https://web.archive.org/web/20200131214418/https://www.fairhavenhealth.com/fertilaid-for-men>.

³⁰ See GD Clifton and JE Ellington, *Prospective study of FertilAid Vitamin in men with low sperm quality*, J. ANDROL, March/April Supplement, Abstract 25 (2009), available at <https://www.fertilaid.com/wp-content/uploads/2018/02/fertile-aid-for-men-study.pdf> (Exhibit 5).

³¹ *Id.*

1 in the morphology of sperm, the motility of sperm, or overall sperm count for those who used
2 FertilAid For Men.

3 79. As shown above, Defendant's marketing statements claim the opposite.
4 Defendant falsely and misleadingly states that using FertilAid For Men is demonstrated to
5 improve sperm morphology, which it then refers to as sperm having "the right shape" in order to
6 reach and fertile an egg.³² But Dr. Ellington did not observe an increase in the "percent of sperm
7 with normal morphology" between the control group and the group receiving FertilAid For Men,
8 even though it was one of the tested parameters in the study.

9 80. Defendant also falsely claims that FertilAid for Men is clinically shown to
10 improve sperm motility. In addition to the above-identified statement, Defendant repeatedly
11 references the motility of sperm in promoting FertilAid for Men. By way of example, Fairhaven
12 has made the following false statements on its webpages titled "FertilAid For Men Clinical
13 Study":³³

14 "The FertilAid For Men Study results indicate statistically-
15 significant improvements in sperm motility for subjects using the
16 dietary supplement."

16 ***

17 "[T]he results of this important study reveal that taking FertilAid
18 for Men significantly increases 'total normal sperm motility' –
19 with a tendency toward an 'increase in total mobile sperm count.'"

19 ***

20 "The results of the FertilAid study revealed a 'significant
21 improvement' in the number of motile sperm, or 'total normal
22 sperm motility.'"

22 81. These statements stand in stark contrast to what was actually demonstrated in the
23 study. Dr. Ellington was clear that, aside from the total normal-motile sperm count and the total
24 motile sperm count, "[o]ther parameters did not differ between the two groups."³⁴ That is, the

25 ³² See *supra* at 29.

26 ³³ See *supra* at 21.

27 ³⁴ See *supra* at 30.

1 study explicitly did not result in any increase in motility, which, as explained by Defendant, is
 2 determined by the percentage of sperm that are moving and their capacity to “swim” in a forward
 3 direction.³⁵ Defendant understands the difference between having low sperm motility versus low
 4 sperm count, and distinguishes the two in its marketing materials. Despite this, Defendant
 5 informed the public that Dr. Ellington’s study proved that FertilAid for Men significantly
 6 increases sperm motility—an improvement Dr. Ellington did not find. (*See supra* at ¶ 78.) Upon
 7 information and belief, Defendant makes false and misleading statements spotlighting the
 8 motility and morphology of sperm because “[m]otility and morphology are also key factors
 9 besides count.”³⁶

10 82. Defendant also makes false and misleading statements concerning sperm count.
 11 As discussed, it was the “total normal-motile sperm numbers in the ejaculate” that was
 12 “improved” among the study subjects using FertilAid for Men. The “total mobile sperm count,”
 13 although observed, only “showed a tendency towards improvement.” Defendant misrepresents
 14 the data to claim the number of motile sperm also experienced *significant improvements* or
 15 *marked increases*,³⁷ then, taking one step further, states that FertilAid for Men is “clinically
 16 proven . . . to improve sperm count.”³⁸ This again ignores what Dr. Ellington stated in the journal
 17 abstract, that the other tested parameters—such as “total ejaculate sperm count”—did not differ
 18 between the control group and the study subjects receiving FertilAid For Men (*supra* at ¶ 78).

19 83. As the study sponsor, Defendant was well aware of the limitations of the study,
 20 including that it was designed to be small and preliminary, that it demonstrated improvement in
 21 only specific aspects of sperm count and the fact that Dr. Ellington called for “[l]arger studies []

22
 23 ³⁵ Fairhaven Health, *FertilAid For Men Supplement Facts*, FertilAid.com,
 24 <https://www.fertilaid.com/fertilaid-men-supplement-facts> (last visited Feb. 5, 2020), *archived*
 25 *at* WayBackMachine (Jan. 30, 2020),
[https://web.archive.org/web/20200130011548/https://www.fertilaid.com/fertilaid-men-](https://web.archive.org/web/20200130011548/https://www.fertilaid.com/fertilaid-men-supplement-facts)
[supplement-facts](https://web.archive.org/web/20200130011548/https://www.fertilaid.com/fertilaid-men-supplement-facts).

26 ³⁶ *See supra* at 29.

27 ³⁷ *See supra* at 20-21.

³⁸ *See supra* at 29.

1 to confirm the results” when she published the study.³⁹ Nonetheless, Defendant went beyond the
 2 limitations of the study to stress FertilAid For Men’s purported benefits on sperm motility,
 3 morphology and overall sperm count because, upon information and belief, most couples seeking
 4 fertility assistance look to improve these aspects of sperm health as material indicators in
 5 assessing male fertility potential. By highlighting the terms “motility,” “morphology” and
 6 “sperm count,” along with words like “clinically proven” and “gold standard,” Defendant has
 7 misled the public—including those who purchase at the stores or on the websites of Target,
 8 Walgreens and Walmart—about the nature of FertilAid For Men and Dr. Ellington’s work
 9 associated thereto.⁴⁰

10 84. In addition, Defendant claims that the FertilAid for Men “formula [] is clinically
 11 validated.”⁴¹ However, upon information and belief, the formula used for the currently marketed
 12 FertilAid For Men is different than the formula examined by Dr. Ellington for her preliminary
 13 study. Defendant fails to notify the purchasing public of this fact.

14
 15 ³⁹ See *supra* at 30.

16 ⁴⁰ See e.g., *FertilAid For Men Fertility Supplement - 90ct*, Target.com,
 17 <https://www.target.com/p/fertilaid-for-men-fertility-supplement-90ct/-/A-75664385> (last visited
 18 Feb. 6, 2020), *archived at* WayBackMachine (Feb. 6, 2020),
 19 [https://web.archive.org/web/20200206001301/https://www.target.com/p/fertilaid-for-men-](https://web.archive.org/web/20200206001301/https://www.target.com/p/fertilaid-for-men-fertility-supplement-90ct/-/A-75664385)
 20 [fertility-supplement-90ct/-/A-75664385](https://web.archive.org/web/20200206001301/https://www.target.com/p/fertilaid-for-men-fertility-supplement-90ct/-/A-75664385); *FertilAid For Men Natural Fertility Supplement,*
 21 *Capsules*, Walgreens.com, [https://www.walgreens.com/store/c/fertilaid-for-men-natural-](https://www.walgreens.com/store/c/fertilaid-for-men-natural-fertility-supplement,-capsules/ID=prod6060700-product)
 22 [fertility-supplement,-capsules/ID=prod6060700-product](https://www.walgreens.com/store/c/fertilaid-for-men-natural-fertility-supplement,-capsules/ID=prod6060700-product) (last visited Feb. 10, 2020), *archived*
 23 *at* WayBackMachine (Feb. 10, 2020),
 24 [https://web.archive.org/web/20200210165952/https://www.walgreens.com/store/c/fertilaid-for-](https://web.archive.org/web/20200210165952/https://www.walgreens.com/store/c/fertilaid-for-men-natural-fertility-supplement,-capsules/ID=prod6060700-product)
 25 [men-natural-fertility-supplement,-capsules/ID=prod6060700-product](https://web.archive.org/web/20200210165952/https://www.walgreens.com/store/c/fertilaid-for-men-natural-fertility-supplement,-capsules/ID=prod6060700-product); *FertilAid for Men - Male*
 26 *Fertility Supplements - 3 Month Supply*, Walmart.com, [https://www.walmart.com/ip/FertilAid-](https://www.walmart.com/ip/FertilAid-for-Men-Male-Fertility-Supplements-3-Month-Supply/652733954)
 27 [for-Men-Male-Fertility-Supplements-3-Month-Supply/652733954](https://www.walmart.com/ip/FertilAid-for-Men-Male-Fertility-Supplements-3-Month-Supply/652733954) (last visited Feb. 6, 2020),
archived at WayBackMachine (Feb. 6, 2020),
[https://web.archive.org/web/20200206000922/https://www.walmart.com/ip/FertilAid-for-Men-](https://web.archive.org/web/20200206000922/https://www.walmart.com/ip/FertilAid-for-Men-Male-Fertility-Supplements-3-Month-Supply/652733954)
[Male-Fertility-Supplements-3-Month-Supply/652733954](https://web.archive.org/web/20200206000922/https://www.walmart.com/ip/FertilAid-for-Men-Male-Fertility-Supplements-3-Month-Supply/652733954).

⁴¹ See *supra* at 20; see also *Fairhaven Health FertilAid for Men Capsule x90 Increase Sperm*
Count Motility, Ebay.com, [https://www.ebay.com/itm/Fairhaven-Health-FertilAid-for-Men-](https://www.ebay.com/itm/Fairhaven-Health-FertilAid-for-Men-Capsule-x90-Increase-Sperm-Count-Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI)
[Capsule-x90-Increase-Sperm-Count-](https://www.ebay.com/itm/Fairhaven-Health-FertilAid-for-Men-Capsule-x90-Increase-Sperm-Count-Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI)
[Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI](https://www.ebay.com/itm/Fairhaven-Health-FertilAid-for-Men-Capsule-x90-Increase-Sperm-Count-Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI)
 (last visited Feb. 6, 2020), *archived at* WayBackMachine (Jan. 31, 2020),
[https://web.archive.org/web/20200131214752/https://www.ebay.com/itm/Fairhaven-Health-](https://web.archive.org/web/20200131214752/https://www.ebay.com/itm/Fairhaven-Health-FertilAid-for-Men-Capsule-x90-Increase-Sperm-Count-Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI)
[FertilAid-for-Men-Capsule-x90-Increase-Sperm-Count-](https://web.archive.org/web/20200131214752/https://www.ebay.com/itm/Fairhaven-Health-FertilAid-for-Men-Capsule-x90-Increase-Sperm-Count-Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI)
[Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI](https://web.archive.org/web/20200131214752/https://www.ebay.com/itm/Fairhaven-Health-FertilAid-for-Men-Capsule-x90-Increase-Sperm-Count-Motility/192032805246?epid=2302797939&hash=item2cb60c117e:g:c7UAAOSwaEhZJKUI).

85. Defendant's false and/or misleading advertising of FertilAid for Men harms Dr. Ellington as well as BioOrigyn because Defendant's unauthorized use of Dr. Ellington's Name and Likeness has inextricably linked BioOrigyn and Dr. Ellington to this product. Dr. Ellington and BioOrigyn are suffering from the false and deceptive practices Fairhaven has used to sell this product. By way of example, BioOrigyn may lose business partners and/or the peer-reviews it otherwise would have received in the process of grant application but for the false claims that impugn the integrity of Dr. Ellington.

COUNT I. BREACH OF THE LIKENESS LICENSE

86. Plaintiffs re-allege paragraphs 1-85 as if fully set forth herein.

87. The Likeness License was a valid and enforceable contract between Dr. Ellington and Fairhaven. Dr. Ellington performed all of her obligations thereunder, and did not waive any of its rights arising therefrom.

88. Defendant terminated the Likeness License in November 2015.

89. Upon termination, the Likeness License requires Defendant discontinue all use of and reference to Dr. Ellington's Name and Likeness. This requirement survives termination of the agreement.

90. However, Defendant breached the Likeness License by, among other things, using Dr. Ellington's Name and Likeness to endorse or approve its products including FertilAid For Men, engaging in false and/or misleading advertising in the detriment of Dr. Ellington's Name and Likeness, and continuing to use her Name and Likeness after Defendant terminated the agreement. *See* Exhibit 1, at *e.g.*, Sections 2 and 9(i).

91. Dr. Ellington has suffered actual damages as a direct and proximate result of Defendant's breach, the exact amount to be determined at trial but including, without limitation, lost royalties from licensing her Name and Likeness and loss of goodwill and integrity associated with her Name and Likeness (*see supra* at ¶¶ 32-33).

92. Unless and until Defendant is enjoined from continuing to breach its obligations under the Likeness License, Dr. Ellington will be irreparably harmed. Dr. Ellington has no adequate remedy at law.

COUNT II. FALSE ASSOCIATION IN VIOLATION OF THE LANHAM ACT

(15 U.S.C. § 1125(a)(1)(A))

93. Plaintiffs re-allege paragraphs 1-92 as if fully set forth herein.

94. Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1), provides, in relevant part, that:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

95. Dr. Ellington is known to be a founder and principal of BioOrigyn. The Name and Likeness of Dr. Ellington are well recognized in the field of fertility science and among consumers who are interested in purchasing products to aid in the quest to conceive and those who are conscious about their overall sexual health.

96. As set forth above, Defendant has intentionally and commercially used the Name and Likeness of Dr. Ellington, including by drawing false association between Defendant and Dr. Ellington, *e.g.*, making her an ongoing “Medical Health Advisor” and an expert “at Fairhaven,” and by exploiting Dr. Ellington’s Name and Likeness in the marketing campaigns concerning, among others, BabyIt (*supra* ¶¶ 45-46, 50-51, 55), IsoFresh (*supra* ¶¶ 47-49, 51, 56), BabyDance (*supra* ¶ 54), and FertilAid for Men (*supra* ¶¶ 58-68).

97. Defendant’s use of the Name and Likeness is not authorized by Dr. Ellington and/or BioOrigyn. The Likeness License allowed Defendant to use Dr. Ellington’s Name and Likeness only on certain Approved Products, for specified purposes—excluding product

1 endorsement—and within a limited duration of time. Following termination of the Likeness
2 License, Dr. Ellington requested that Defendant discontinue any use of her Name and Likeness
3 no later than June 2017. But Defendant did not stop using Dr. Ellington’s Name and Likeness in
4 commercial settings.

5 98. Defendant misused Dr. Ellington’s Name and Likeness at least on its websites,
6 including brand specific websites such as MyIsoLove.com and FertilAid.com, on the online retail
7 storefronts controlled by or operated on behalf of or for the benefits of Defendant, and through
8 additional online platforms of its authorized or partnered distributors. Over the years,
9 Defendant’s exploitation of Dr. Ellington’s Name and Likeness has led to widespread
10 unauthorized use of her Name and Likeness.

11 99. Defendant’s misuse of Dr. Ellington’s Name and Likeness is likely to confuse
12 consumers as to the relationship between Defendant and Plaintiffs, and as to Plaintiffs’ approval
13 of the various products marketed by Defendant including the IsoLove products and FertilAid for
14 Men.

15 100. In fact, the false association drawn by Defendant through the use of Dr.
16 Ellington’s Name and Likeness has deceived a substantial segment of the relevant purchasing
17 public. For example, a social media article affirmatively introduces Dr. Ellington as a “fertility
18 expert *at Fairhaven Health*” (*see supra* at ¶ 39). A reasonable consumer would assume that
19 Dr. Ellington is associated with Defendant and that she approves the IsoLove products as
20 marketed by Defendant because, for example, Defendant uses her Name to endorse BabyIt on its
21 product packaging. Similarly, a consumer would assume that Dr. Ellington must have also
22 endorsed FertilAid For Men by virtue of her giving a “Testimonial” on Defendant’s website.

23 101. Consumers in the quest to conceive or suffering from personal care and hygiene
24 issues are susceptible to false information and tend to regard as true product features as marketed.
25 Indeed, they will likely, and reasonably, lower their guard in the face of the statements made by
26 Defendant—one of “the most trusted providers” in the field—including believing any express or
27 implied statements that Defendant’s products have earned the approval of Dr. Ellington.

1 102. Upon information and belief, Defendant knew that Dr. Ellington's Name and
2 Likeness promote or act as a catalyst for the promotion of Defendant's products, and sought to
3 take advantage thereof. Defendant also knew that the impression and statements it made in the
4 advertising were false and deceptive, or at least acted in reckless disregard of their truth or falsity.

5 103. Defendant has misused her Name and Likeness through various online channels
6 and further through products and marketing materials that are disseminated throughout the
7 country and overseas, thereby causing the false association and product endorsements to enter
8 interstate commerce.

9 104. As a direct and proximate result of Fairhaven's deceptive practices, Plaintiffs have
10 suffered and will continue to suffer monetary and non-monetary damages including lost royalties
11 from licensing the Name and Likeness, and the dilution of goodwill associated with BioOrigyn
12 and the reputation pertaining to the Name and Likeness of Dr. Ellington.

13 105. Plaintiffs therefore seek judgment in their favor and an award of actual, incidental,
14 and consequential damages as permitted by law, including punitive and treble damages,
15 Defendant's profits or gains resulting from its willful acts of unfair competition, and interest,
16 attorneys' fees, costs and disbursements, and all other relief permitted by law that this Court
17 deems appropriate including enjoining Defendant's conducts that violate Section 43(a)(1) of the
18 Lanham Act, 15 U.S.C. § 1125(a)(1).

19 106. Unless Defendant is preliminarily and permanently enjoined from the foregoing
20 conduct, Plaintiffs will be irreparably harmed, at least by Defendant continuing to use of
21 Dr. Ellington's Name and Likeness, by loss of confidence and trust and other potential business
22 partners, loss of goodwill, and loss of reputation, integrity, professional standing and business
23 interest, and further by present economic loss, which is not fully ascertainable at this time, and
24 future economic loss which is presently not fully calculable. Plaintiffs have no adequate remedy
25 at law.

COUNT III. FALSE ADVERTISING IN VIOLATION OF THE LANHAM ACT

(15 U.S.C. § 1125(a)(1)(B))

107. Plaintiffs re-allege paragraphs 1-106 as if fully set forth herein.

108. Section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1), provides, in relevant part, that:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

109. As set forth above, Dr. Ellington is a founder and principal of BioOrigyn, and is widely respected in the field of fertility science. Defendant appreciates the value associated with Dr. Ellington's Name and Likeness, which is well recognized among the relevant purchasing public, and takes advantage thereof.

110. Capitalizing on the use of Dr. Ellington's Name and Likeness, Defendant has made false statements of facts in the marketing campaigns concerning, among others, BabyIt (*supra* ¶¶ 70), BabyDance (*supra* ¶¶ 71-74), and FertilAid for Men (*supra* ¶¶ 75-85).

111. Defendant's statements misrepresent the nature, characteristics and qualities of its products and services. In particular, without limitation, Defendant advertises FertilAid For Men as a super fertility pill that is clinically proven in an independent study to significantly increase *sperm count*, *motility*, as well as *morphology*. This concerns the core feature of the product, but is false. In fact, Defendant's statement stands in stark contrast to the results of the clinical study, which is, as advertised in Defendant's marketing materials, conducted by Dr. Ellington.

112. As a further example, quoting Dr. Ellington on the BabyIt packaging, Defendant markets BabyIt as having no irritation potential. This concerns the core feature of the product,

1 but customer complaints have shown this to be false and misleading. In fact, irritation has
2 bothered a number of customers using BabyIt.

3 113. In addition, Defendant promotes BabyDance by comparing it with its competing
4 product Pre-Seed, indicating that Pre-Seed is not isotonic and not pH-balanced. This concerns
5 key characteristics of Pre-Seed, but is false and misleading. Pre-Seed is known for being isotonic
6 and pH balanced, which is why it is the first and leading fertility lubricant on the market.

7 114. The foregoing false and/or misleading statements made by Defendant are material
8 in that they affect the purchasing decisions of the relevant public. For example, Defendant's
9 false statements urge customers who are concerned about having reduced sperm motility and/or
10 having abnormal morphology to purchase FertilAid for Men—a purchasing decision some of
11 them would not have made if limitations of the product were truly delineated. Consumers may
12 also elect not to purchase FertilAid For Men should they learn about the fact that Fairhaven
13 funded the clinical study that it claims to be independent or that the formula of the product has
14 changed after the study.

15 115. In addition, customers who are in need of fertility lubricants may choose
16 BabyDance over Pre-Seed based on the statements that only BabyDance has the qualities of being
17 isotonic and a pH that matches the pH levels of fertile quality fluid.

18 116. As another example, some consumers would be less likely to purchase or continue
19 to purchase BabyIt for personal use should they know—contrary to what's claimed on
20 Defendant's website and purportedly stated by Dr. Ellington on the product packaging—it is
21 possible that using the product might cause irritation.

22 117. As discussed above, Defendant makes the foregoing false and/or misleading
23 statements in advertising and promotional materials such as on its websites, including brand
24 specific websites like MyIsoLove.com and FertilAid.com, on the online retail storefronts
25 controlled by or operated on behalf of or for the benefits of Defendant, and through additional
26 online platforms and/or retail stores of its partnered distributors such as Target and Walgreens.
27 Defendant made false and/or misleading statements in commercial settings and intended its

1 statements to be widely disseminated to influence consumers—such as those who are in the quest
2 to conceive and who are conscious about overall sexual health—to purchase Defendant’s
3 products or services.

4 118. Upon information and belief, Defendant knew that the statements it made in the
5 advertising and/or the impression likely drawn from its statements are false and misleading, or
6 acted in reckless disregard of their truth or falsity.

7 119. Upon information and belief, Defendant also knew or should have known that
8 people who are in the quest to conceive or suffering from personal care and hygiene issues can
9 be more susceptible to false information and regard as true product features as marketed.
10 Therefore, Defendant understands that its statements have actually deceived or have the tendency
11 to deceive a substantial segment of its audience.

12 120. Nevertheless, along with the widespread unauthorized use of Dr. Ellington’s
13 Name and Likeness, Defendant has engaged in false advertising across various online channels
14 and throughout the country and overseas, thereby causing its false statements to enter interstate
15 commerce.

16 121. As a direct and proximate result of Defendant’s false advertising, Plaintiffs have
17 suffered and will continue to suffer monetary and non-monetary damages, including in the form
18 of lost royalties from BabyIt upon the public discovering Defendant’s deceptive business
19 practices, by direct diversion of sales from Pre-Seed to the BabyDance product, and loss of
20 business interest. In addition, Plaintiffs have suffered and will continue to suffer damages from
21 a lessening of goodwill associated with Pre-Seed and BabyIt, and from the reputational harm
22 pertaining to Dr. Ellington’s Name and Likeness and reflecting on BioOrigyn, including injuries
23 to professional standing as well as reputation for integrity.

24 122. Plaintiffs therefore seek judgment in their favor and an award of actual, incidental,
25 and consequential damages as permitted by law, including punitive and treble damages,
26 Defendant’s profits or gains resulting from its willful acts of unfair competition, and interest,
27 attorneys’ fees, costs and disbursements, and all other relief permitted by law that this Court

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1 deems appropriate including enjoining Defendant's conducts that violate Section 43(a)(1) of the
2 Lanham Act, 15 U.S.C. § 1125(a)(1).

3 123. Unless Defendant is preliminarily and permanently enjoined from the foregoing
4 conduct, Plaintiffs will be irreparably harmed, at least by Defendant continuing to use of Dr.
5 Ellington's Name and Likeness in its deceptive commercial practices, by loss of confidence and
6 trust and other potential scientific and/or business partners, loss of goodwill, and loss of
7 reputation, integrity, professional standing and business interest, and further by present economic
8 loss, which is not fully ascertainable at this time, and future economic loss which is presently not
9 fully calculable. Plaintiffs have no adequate remedy at law.

10 **COUNT IV. INFRINGEMENT OF PERSONALITY RIGHTS**

11 (Wash. Rev. Code § 63.60.010, *et seq.*)

12 124. Plaintiffs re-allege paragraphs 1-123 as if fully set forth herein.

13 125. As set forth above, Fairhaven has, without authorization, exploited Dr. Ellington's
14 Name and Likeness, as well as certain distinctive and original attributes of Dr. Ellington. For
15 example, Fairhaven quoted Dr. Ellington on the packaging of its products, and systematically
16 drew an association with Dr. Ellington across online platforms through the use of her Name and
17 Likeness.

18 126. Such use was not authorized. Any limited authorization granted to Fairhaven by
19 virtue of the Likeness License or otherwise on an *ad hoc* basis has expired in its entirety. Dr.
20 Ellington unequivocally requested that Fairhaven stop all use of her Name and Likeness no later
21 than June 2017.

22 127. The misappropriation encompasses a plethora of marketing activities of
23 Fairhaven, and is intended to benefit Fairhaven, at least through an increase in the sales of its
24 products such as BabyIt (*supra* ¶¶ 45-46, 50-51, 55), IsoFresh (*supra* ¶¶ 47-49, 51, 56),
25 BabyDance (*supra* ¶ 54), and FertilAid for Men (*supra* ¶¶ 58-68), and through the gain in
26 Defendant's reputation by trading on Dr. Ellington's reputation and goodwill.

128. As a direct and proximate result of Fairhaven's misappropriation, the good faith and reputation of Dr. Ellington is tarnished among peer scientists and the public. Dr. Ellington along with BioOrigyn, the company she founded, have suffered and will continue to suffer monetary and non-monetary losses under Washington law, including without limitation, profits that are attributable to the misappropriation.

129. Unless Defendant is preliminarily and permanently enjoined from the foregoing conduct, Plaintiffs will be irreparably harmed, at least by Defendant continuing to use of Dr. Ellington's Name and Likeness and continuing its deceptive commercial practices, by loss of confidence and trust and other potential business partners, loss of goodwill, and loss of reputation, integrity, professional standing and business interest, and further by present economic loss, which is not fully ascertainable at this time, and future economic loss which is presently not fully calculable. Plaintiffs have no adequate remedy at law.

**COUNT V. UNFAIR BUSINESS PRACTICES IN VIOLATION OF WASHINGTON
CONSUMER PROTECTION ACT**

(Wash. Rev. Code § 19.86.020, *et seq.*)

130. Plaintiffs re-allege paragraphs 1-129 as if fully set forth herein.

131. As set forth above, Dr. Ellington is a founder and principal of BioOrigyn, and is widely respected in the field of fertility science. Defendant appreciates the value associated with Dr. Ellington's Name and Likeness, which is well recognized among the relevant purchasing public, and takes advantage thereof. Among others, Defendant has made false statements and engaged in deceptive business practices concerning the sales of BabyIt (*supra* ¶¶ 70), BabyDance (*supra* ¶¶ 71-74), and FertilAid for Men (*supra* ¶¶ 75-85).

132. Defendant's conducts and trade practices have the capacity to deceive a substantial portion of the public. For example, Defendant advertises FertilAid For Men as being clinically proven to significantly improve *sperm count*, *motility* and *morphology*, but in fact the study explicitly disclaimed finding such improvements. Defendant's statement misrepresents the core feature of FertilAid for Men, and may therefore deceive a large number of customers who

1 are concerned about having reduced sperm motility and/or morphology into purchasing the
2 product.

3 133. As a further example, Defendant continues to include a product endorsement on
4 the packaging of BabyIt to promote its non-irritating formula when in fact irritation has bothered
5 a number of users of BabyIt. This misrepresents a material aspect of the product, and may
6 therefore deceive more consumers into purchasing or re-purchasing BabyIt for its non-irritation
7 potential.

8 134. In addition, Defendant promotes BabyDance by comparing the product with Pre-
9 Seed, indicating that Pre-Seed is not isotonic and not pH-balanced—which it is. This again
10 misrepresents key characteristics of the products. As a result, customers who are in need of
11 fertility lubricants may choose BabyDance over Pre-Seed.

12 135. Upon information and belief, Defendant knew its statements and/or the
13 impression likely drawn from its statements are false and misleading, or acted in reckless
14 disregard of their truth or falsity. Defendant also knew or should have known that people who
15 are in the quest to conceive or suffering from personal care and hygiene issues can be more
16 susceptible to deceptive business practices and regard as true product features as marketed. Thus,
17 Defendant understands that the statements it made and the associated trade practices have
18 actually deceived or at least have the capacity to deceive a substantial portion of the public.

19 136. Defendant's foregoing deceptive business practices occurred in the conduct of
20 trade or commerce, as they are directed to the sales and promotion of its products including
21 BabyIt, BabyDance, and FertilAid for Men. As discussed above, Defendant makes false and/or
22 misleading statements in advertising and promotional materials such as on its websites, including
23 brand specific websites like MyIsoLove.com and FertilAid.com, on the online retail storefronts
24 controlled by or operated on behalf of or for the benefits of Defendant, and through additional
25 online platforms and/or retail stores of its partnered distributors such as Target and Walgreens.

26 137. In particular, but without limitation, Defendant made false and/or misleading
27 statements in commercial settings and intended its statements to be widely disseminated to urge

1 consumers into purchasing Defendant's products. Thus, along with the widespread unauthorized
 2 use of Dr. Ellington's Name and Likeness, Defendant has engaged in false advertising that
 3 directly or indirectly affects consumers in the state of Washington.

4 138. Defendant's deceptive business practices have affected the public interest. As set
 5 forth above, Defendant has misused Dr. Ellington's Name and Likeness in a manner that both
 6 violates the Lanham Act and infringes the personality rights protected under Washington law,
 7 which evidences public deception and confusion caused by Defendant's conducts. In addition,
 8 the misuse of Dr. Ellington's Name and Likeness and Defendant's other deceptive practices serve
 9 a common goal—*i.e.*, to promote products and services of Defendant to the public. As discussed,
 10 Defendant has routinely and systematically engaged in deceptive acts in the course of selling and
 11 promoting its products including BabyIt, BabyDance, and FertilAid for Men. This pattern of
 12 deceptive conducts has caused and will continue to cause deception or confusion to the detriment
 13 of public interest. For example, due to Defendant's false advertising, consumers may purchase
 14 FertilAid For Men in the hope to solve the sperm motility and/or morphology issues they are
 15 struggling with. It is also likely that consumers purchase BabyIt believing in its non-irritation
 16 potential but later experience the opposite. Moreover, Defendant casts doubt on public health by
 17 mischaracterizing the nature of BabyDance and Pre-Seed, including falsely stating that the
 18 fertility lubricant products are "approved" by the FDA and that Pre-Seed is not isotonic or pH
 19 balanced. Consumers may suffer further from a lack or reduced level of competition because of
 20 Defendant's deceptive business practices in the promotion of BabyDance.

21 139. As a direct and proximate result of Defendant's deceptive business practices,
 22 Plaintiffs have suffered and will continue to suffer monetary and non-monetary damages,
 23 including in the form of lost royalties from BabyIt upon the public discovering Defendant's
 24 deceptive business practices, by direct diversion of sales from Pre-Seed to the BabyDance
 25 product, and loss of business interest. In addition, Plaintiffs have suffered and will continue to
 26 suffer damages from a lessening of goodwill associated with Pre-Seed and BabyIt, and from the
 27

1 reputational harm pertaining to Dr. Ellington's Name and Likeness and reflecting on BioOrigyn,
2 including injuries to professional standing as well as reputation for integrity.

3 140. Plaintiffs therefore seek judgment in their favor and an award of actual, incidental,
4 and consequential damages as permitted by law, including punitive and treble damages,
5 Defendant's profits or gains resulting from its willful acts of unfair competition, and interest,
6 attorneys' fees, costs and disbursements, and all other relief permitted by law that this Court
7 deems appropriate including enjoining Defendant's conducts that violate Washington Consumer
8 Protection Act.

9 141. Unless Defendant is preliminarily and permanently enjoined from the foregoing
10 conduct, Plaintiffs will be irreparably harmed, at least by Defendant continuing to use of Dr.
11 Ellington's Name and Likeness in its deceptive commercial practices, by loss of confidence and
12 trust and other potential scientific and/or business partners, loss of goodwill, and loss of
13 reputation, integrity, professional standing and business interest, and further by present economic
14 loss, which is not fully ascertainable at this time, and future economic loss which is presently not
15 fully calculable. Plaintiffs have no adequate remedy at law.

16 **PRAYER FOR RELIEF**

17 1. Plaintiffs respectfully request that this Court enter a judgment in their favor and
18 grant the following relief:

19 2. A finding that Defendant Fairhaven breached the Likeness License;

20 3. A finding that Defendant Fairhaven engaged in false association and false
21 advertising in violation of Lanham Act 15 U.S.C. § 1125(a)(1);

22 4. A finding that Defendant Fairhaven infringed the propriety right of Dr. Ellington
23 in violation of Wash. Rev. Code § 63.60.050;

24 5. A finding that Defendant Fairhaven engaged in deceptive business practices in
25 violation of Wash. Rev. Code § 19.86.020;

26 6. An order and judgment awarding Plaintiffs the actual, incidental, consequential
27 damages, and all other relief as permitted by Washington law;

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7. Injunctive relief immediately and permanently ordering Defendant Fairhaven cease and desist its deceptive business practices, including removing all references to Dr. Ellington—including all use of her Name and Likeness and all use of her original words or attributes—from the packaging of Fairhaven’s products and from all media platforms within Fairhaven’s reasonable control, such as websites controlled by or operated on behalf of or for the benefits of Fairhaven, and removing all statements in the promotional or marketing materials that are false and/or misleading;

8. An order declaring this case exceptional and awarding Plaintiffs their reasonable attorneys' fees and costs in accordance with 15 U.S.C. § 1117 and Wash. Rev. Code § 63.60.060; and

9. Any other relief that the Court may deem appropriate and just under the circumstances.

Dated this 24th day of February 2020.

/s/ Tiffany Scott Connors

Tiffany Scott Connors, WSBA #41740

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 24th day of February 2020, the foregoing document was presented to the Clerk of the Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 24th day of February, 2020, at Seattle, Washington.

/s/Tiffany Scott Connors
Tiffany Scott Connors